NO. 85-406

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Supreme Court, U.S.
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GEORGE R. ARIYOSHI, GOVERNOR,
STATE OF HAWAII, et al.,

Petitioners,

vs.

SELWYN A. ROBINSON, et al.,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS ROBINSON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents Robinson beg leave to file this supplemental brief in reply to the Solicitor General's brief. Unfortunately, the Solicitor General relies on the opinion of the Supreme Court of Hawaii in its Answers to Certified Questions. Pet. App. 14a. Therefore the brief suffers from a basic misunderstanding of the record and nature of the proceedings below. It is the Solicitor General's position that the case should be remanded to the Court of Appeals for further consideration in light of this court's opinion in Williamson County Regional Planning Commission v. Hamilton Bank, No. 84-4 (June 27, 1985).

Williamson County is a case which dealt with the issue of when zoning and planning requirements become final and are so onerous that an unconstitutional taking of property without due process occurrs. It held that the landowner had not obtained a final decision regarding the application of

the zoning ordinance and regulations to its property because it had not applied for a variance. Furthermore, it had not utilized the state procedures provided for obtaining compensation for a taking. Therefore, the landowner's taking claim was not ripe for consideration by the federal courts.

The Solicitor General strains to push the case at bar into the Williamson County mold by extracting statements from answers to certified questions by the Supreme Court of Hawaii. That opinion was written by Chief Justice Richardson who was so aggrieved by the decision of the United States District Court that he appeared as amicus in the Ninth Circuit Court of Appeals urging reversal. Although in effect a party to the case, the Chief Justice refused to recuse himself and authored the opinion which was issued the day before he retired. Pet. App. 14a, 66 Haw. Listing of Justices.

I

The Requirements Of Williamson County Have Been Satisfied As To Finality.

Contrary to the position of the Solicitor General, there are no on-going proceedings contemplated or required in McBryde. That suit was in the nature of a quiet title or declaratory judgment action to quantify water rights in the Hanapepe River. The law as to how those rights were determined was clearly established and were to be decided "in conformity with vested rights". HRS Sec. 664-32 The Robinsons had already been determined to own normal surplus water of the Hanapepe River in Territory v. Gay, 31 Hawaii 376 (1930) aff'd, 52 F.2d 356 (9th Cir.), cert. denied, 284 U.S. 677 (1931). The decree of the Court of the Appeals for the Ninth Circuit affirming the Supreme Court of the Territory of Hawaii vested the ownership of the normal surplus

water and the right to continue to divert said water in the Robinsons. The district court found that this ownership was recognized by the State in McBryde:

> "The ownership of the normal surplus water of the Koula Stream which flows into the river was admitted in the proceedings in McBryde to be the property of G&R and at no time did the State or any other party deny or dispute G&R's right to take the normal surplus water so owned out of the River and to transport the same to Makaweli." Finding of Fact No. 3 Pet. App. 75a-76a.

> "The only issues of fact or law tried in McBryde in the Fifth Circuit Court were (1) the identity and extent of the privately or publicly owned land having appurtenant water rights, and privately or publicly owned water rights owned separately from land, (2) the quantity of water attributable to the identified water rights, (3) McBryde's claim by adverse possession against G&R to prescriptive water out of G&R's normal surplus water and the quantity of such prescriptive water, and (4) the claims of the State, McBryde and plaintiffs to a division of the storm and freshet surplus." Finding of Fact 7 Pet. App. 77a.

After a trial of three and a half months in 1965, the trial court entered its decision based on the ownership of lands in

the Hanapepe Valley which were entitled to water to grow taro at the time of the Mahele in 1848. The quantification of water rights was important to McBryde, Gay & Robinson and its lessee Olokele because the water is needed to irrigate sugar land outside the Hanapepe watershed. The Court made the following award of appurtenant water.

1. To McBryde Sugar Company, Limited 4,915,400 gallons of water per day.

2. To the State of Hawaii, 4,167,650 gallons of water per day.

3. To Gay & Robinson, 1,533,050 gallons of water per day.

4. To other landowners, a total aggregating 1,456,950 gallons per day.

In addition to appurtenant rights, Plaintiff McBryde Sugar Company, Limited was awarded prescriptive water rights out of Gay & Robinson's surplus in the amount of 2,084,600 gallons of water per day giving it a right to take a total of 7,000,000 gallons

per day from the Hanapepe River. Said prescriptive rights were awarded on the theory that for a continuous period of 10 years, Gay & Robinson, the owner of the normal surplus water, had allowed McBryde to take at least that much water out of the river until creating an improved water system in 1949. Gay & Robinson was awarded the remaining surplus water including storm and freshet surplus. Obviously, at that point, the judgment of the trial court was final. Each party knew exactly how much water it was entitled to receive from the Hanapepe River.

The Supreme Court of Hawaii proceeded to affirm the award of appurtenant water rights but reversed the trial judge with respect to surplus water and prescriptive rights. The State not Gay and Robinson owned all surplus water. It concluded with this language:

> "Neither McBryde nor Gay & Robinson have any right to divert water from Koula

Stream and Hanapepe River out of Hanapepe Valley into other watersheds. " Pet. App. 18a.

There was no remand and there obviously was no need for any.

The state owned all water in the Hanapepe River subject to the right of appurtenant and riparian owners to use the water in the Valley but the owners were not to transport water out of the watershed. Of course Gay & Robinson, Olokele and McBryde had no use for water except to irrigate their sugar fields outside the watershed. Olokele had not participated at trial because its water came from Gay & Robinson's ditch pursuant to its lease. The judgment was final, the rights of all parties had been declared and there were no further proceedings contemplated.

The issue of finality for res judicata purposes was raised at the argument in 1979 before the Court of Appeals and the issue was briefed. The state officials

argued that the McBryde judgment was final and the Court of Appeals should not "consider the instant proceedings to be premature." Robinson Brief App. 12.

The Solicitor General recognizes that McBryde appeared final in 1973. The District Court, the Court of Appeals and the parties to this litigation all agreed to the finality of McBryde. The final judgment in McBryde in 1973 did not cease being final in 1982, when there had been no further proceedings in the case over that period of time.

Obviously, if the Solicitor General were correct, there would never be a final judgment adjudicating water rights in Hawaii. This view is contrary to the statutory direction that water rights are to be determined "in conformity with vested rights." HRS Sec. 664-34. It is inconceivable that an adjudication final on its face, the effect of which has been

litigated in federal court for nine years could become a mere interlocutory expression of opinion, albeit an expression of opinion binding on all other courts in the State of Hawaii.

II

The Answers To Certified Questions In This Case Do Not Change The Judgment In McBryde From A Final To Interlocutory Judgment.

The Court of Appeals certified six questions to the Supreme Court of Hawaii. None of the questions asked specifically whether further proceedings were contemplated in the McBryde case itself.

The answer to the first question was that McBryde did not enjoin or explicitly prohibit the diversion of water from the watershed. Pet. App. 18a-21a. Apparently, the entire opinion in McBryde was dicta, although dicta binding on all the courts of Hawaii under the doctine of stare decisis.

Secondly, the State of Hawaii could not claim collateral estoppel or bar and merger from McBryde if the State brought an action either to quiet title to the water of the Hanapepe or to enjoin the diversion of water from the Hanapepe because there was no final judgment, only binding dicta on these issues. Pet. App. 21a-25a. However, the Court did hold that the McBryde judgment was final in part:

> "On appeal this Court affirmed in part the award of appurtenant water rights and reversed the trial court's award of prescriptive and surplus waters. We also confirmed the existence of riparian rights, delineated limitations on the right to transport appurtenant and riparian waters, and found that the State was the owner of surplus water. But no specific instruction was imparted to the trial court, and this Court did not utilize its power to render a final judgment. Our judgment appeal only provided that the trial court's judgment was `affirmed in part; reversed in part'." Pet. App. 23a-24a.

There was no remand and there was nothing left in the Supreme Court's or parties' view to try in the trial court. The State owned the surplus water. No party was

interested in further litigation with regard to its riparian right to have the water proceed in its natural state down the Hanapepe River to the ocean.

The answer to the third question shows the finality of McBryde.

> "Question 3. Do the rulings in McBryde with respect to water ownership and water diversion have binding precedential effect on the Hawaii state courts?" Pet. App. 25a

The Court's answer was:

> "In sum, we answer question 3 affirmatively. The rulings in McBryde with respect to water ownership and water diversion have binding effect in the state courts of Hawaii." Pet. App 28a.

In other words, the Supreme Court of Hawaii has stated that the State of Hawaii is the owner of the surplus water of the Hanapepe River contrary to the adjudicated vested rights of the Robinsons.

For the Solicitor General to say based on the answers to certified questions, the proceedings are pending in the McBryde

case is far-fetched and contrary to the record in this case. The attempt in the Answers to maintain that further proceedings were contemplated was a patent attempt to induce the Court of Appeals to dismiss the case while maintaining the unconstitutional effect of the McBryde decision.

III

The Fifth Circuit Court Is Not A Water Regulating Agency.

The Solicitor General makes the erroneous assumption that the Fifth Circuit Court was regulating the use of water. In fact, the trial judge was adjudicating water rights as a court in conformity with vested rights. There is no ongoing regulation of the use of water in the Hanapepe River. The appurtenant water rights have been quantified. The rest belongs to the State. The Robinsons have appurtenant rights to 1,533,000 gallons per day to use on their ancient taro lands in Hanapepe, but not on

their sugar lands. They have lost the right to their surplus water which is vastly more important. The judgment in McBryde is not similar to the action of a planning commission to which a disappointed applicant requesting approval of a development plan can submit a new plan or ask for a variance.

IV

There Is No Procedure To Obtain Compensation For Taking Of Plaintiffs' Vested Water Rights.

Williamson County was a taking case in which compensation for the taking was requested. It held that the landowner's failure to sue in state court under an inverse condemnation procedure that was available made resort to the federal court unnecessary and improper. In answer to Question 5, the Supreme Court of Hawaii agreed that there was "no provision for a suit against the State seeking damages based on any `taking' resulting from the McBryde

opinion." Note 13 Pet. App. 31a. In any event, the Answer to Question 5 holds that the decision in McBryde precludes compensation to the Respondents for the taking of their water rights. Pet. App. 31a-42a.

V

The Robinsons Had Vested Rights In The Normal Surplus Water Of The Hanapepe River.

The Solicitor General doubts that the Robinsons had vested rights to the normal surplus water of the Hanapepe River. Sol. Gen. Brief 14, note ____. However, the opinion of the Supreme Court of Hawaii in Territory v. Gay stated specifically that the adoption of the common-law doctrine of riparian rights in 1930 "with reference to normal surplus water would alter established rights." 31 Hawaii 396. Furthermore, the court stated:

> Water rights it need hardly be added have financial value. The legal possibility that some of the water may be wasted by an owner is no

justification for depriving him of his right thereto without just compensation." 31 Haw. 401.

This is exactly what the Supreme Court of Hawaii did in 1973.

Although there was no need to quantify the water being diverted in Territory v. Gay, it was sufficient to irrigate 7,000 acres of cane land. Id. 398. This water was judicially admitted in Territory v. Gay to be surplus water.

The maximum amount diverted by the old ditch from 1891 to 1949 was determined by the trial court in McBryde to be 40,000,000 gallons per day. Finding No. 31, Pet. App. 31. This finding was adopted by the District Court. Pet. App. 75a. The right to own and divert that water was a vested right.

The Supreme Court in its Answers to Certified Question continues to deny the Robinsons any vested rights in the surplus waters of the Hanapepe River. The opinion reiterates that the State owns all surplus

water and in Answer to Question 4 that Territory v. Gay has no validity for res judicata purposes. There is a very dark cloud on plaintiffs' title to its vested property rights. Pet. App. 28a-31a.

Certainly plaintiff can make no further investment in irrigation systems, sugar mills, or other improvements requiring an assured water supply. The value of plaintiffs' land has been drastically impaired. At the time of trial, sugar land was appraised for tax purposes at $666 per acre and poor pasture land which it would become without water at $8 per acre. Finding of Fact 32 Pet. App.85a-86a.

The Solicitor General admits that "the economic impact of the judicially fashioned rules and the extent of their interference with reasonable investment-backed expectations [can] be considered . . . by a federal court considering a taking claim . . . [if there has been definitive state

court action.]" Sol. Gen. Brief, 11. The denial of Plaintiffs vested rights is definitive state action. No other judicial action is pending or contemplated. No regulatory proceedings can be conducted as no regulatory system even exists. Furthermore, no procedure exists in the state courts which allow plaintiffs any means of obtaining compensation for the distribution of their vested rights.

Under these circumstances, the Court of Appeals correctly determined that the federal court had jurisdiction over plaintiffs' federal claims which were ripe for adjudication. There is no reason why the case should be remanded to the Court of Appeals and this is not a case that requires further judicial attention in this Court.

VI

The Judgment In Territory v. Gay Was A Federal Judgment And Its Validity And Res Judicata Effect Is A Federal Question Ripe For Adjudication.

The Solicitor General's Brief ignores the issues raised by Respondent Olokele in its Brief to the effect that the federal courts have the power to effectuate their judgments. A clear case and controversy exists between Plaintiffs Robinson and Petitioner state officials as the validity and effect of Territory v. Gay.

The Supreme Court of Hawaii has twice ruled that Territory v. Gay does not have res judicata effect with respect to the Robinsons' right to divert the normal surplus water from Koula to its own and Olokele's sugar fields. In McBryde, the court held that although Gay and Robinson was awarded the ownership of normal surplus water in Territory v. Gay that case was decided in a vacuum, and since the court in McBryde adopted the riparian law of Massachusetts Gay & Robinson took nothing because there was no such thing as normal surplus water.

In the Answer to Certified Question 4, Chief Justice Richardson now argues that res judicata does not apply because "we do not view the action in Gay II as one to enjoin a wrongful diversion of water." Pet. App. 30a. This is absolutely contrary to the opinions of all of the courts in Territory v. Gay.

In light of the Answers to Certified Questions, the state officials continue to maintain that Territory v. Gay is a "nullity". Robinson App. 21.

The federal courts have jurisdiction to enforce their judgments against collateral attack and the Court of Appeals had jurisdiction to declare the res judicata effect of its own judgment in Territory v. Gay against the continuing attack of the state officials. Steelman v. All Continent Co., 301 U.S. 278 (1937); Dugas v. American Surety Co., 300 U.S. 414 (1937); Local Loan Co. v. Hunt, 292 U.S. 234 (1934);

see also: Aerojet General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975), appeal dismissed, cert. denied 423 U.S. 908 (1975).

CONCLUSION

The federal issues were ripe for adjudication and were properly decided. There is no reason for further consideration of the Respondents' vested water rights which have been in litigation for over half a century.

DATED: Honolulu, Hawaii, June 9, 1986.

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